

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

AUG 13 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0219-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
MATT JEFFREY MDED,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF YAVAPAI COUNTY

Cause No. P1300CR20070714

Honorable Celé Hancock, Judge

REVIEW GRANTED; RELIEF DENIED

Sheila Sullivan Polk, Yavapai County Attorney  
By Bill R. Hughes

Prescott  
Attorneys for Respondent

Matt J. Mided

San Luis  
In Propria Persona

ESPINOSA, Judge.

¶1 Petitioner Matt Mided seeks review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See*

*State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Mided has not met his burden of establishing such abuse here.

¶2 After waiving his right to counsel and a jury trial, and agreeing to be tried by the court “on exhibits,” Mided was convicted of transportation for sale of a dangerous drug and possession of drug paraphernalia. He was sentenced to concurrent prison terms, the longest of which was 7.5 years, and the convictions and sentences were affirmed on appeal. *State v. Mided*, No. 1 CA-CR 08-0885 (memorandum decision filed Oct. 29, 2009).

¶3 Mided then filed a notice of post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but had found no “claims for relief to raise in this post-conviction proceeding.” Mided filed a pro se petition and supplement raising various claims. He then requested permission to file an amended petition, which the trial court allowed. In his amended petition, Mided claimed “the trial court, state, and [Yavapai County Sherriff’s Office]” had hindered his right to self-representation during trial by denying him “meaningful access to telephone, to send and receive mail to counsel and potential witnesses, and to legal materials.” He also asserted that his waiver of his right to counsel was involuntary because he had been forced to choose between “poor counsel” and self-representation, his trial counsel had been ineffective in failing to obtain evidence relevant to a motion to suppress, and his appellate counsel had been ineffective in failing to argue on appeal that his waiver of counsel had been involuntary. The court summarily dismissed the petition

¶4 Mided repeats his claims on review and asks this court to vacate his convictions and sentences and order a new trial.<sup>1</sup> However, Mided’s claim that his waiver of counsel was involuntary is precluded by Rule 32.2(a)(3) because it could have been, but was not, raised on direct appeal. *See, e.g., State v. Moody*, 192 Ariz. 505, ¶¶ 22-23, 968 P.2d 578, 582 (1998) (addressing on appeal claim of involuntary waiver of counsel). For the same reason, we find precluded his claim that the state interfered with his right to self-representation by denying him access to resources he believed necessary to mount his defense. *See, e.g., State v. Murray*, 184 Ariz. 9, 28, 906 P.2d 542, 561 (1995) (rejecting appellant’s claim he was denied access to court). Mided raised the substance of that claim repeatedly during trial, and does not suggest there are additional facts needed to support it that he could not or did not identify during trial. *See State v. Cabrera*, 114 Ariz. 233, 236, 560 P.2d 417, 420 (1977) (post-conviction proceeding “provides a remedy for matters which do not have sufficient record to provide appellate review”). And Mided was given the opportunity to, but did not, raise this claim on appeal in a supplemental brief after his appellate counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967). Finally, Mided does not argue his appellate counsel was ineffective for failing to raise this claim.

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<sup>1</sup>In his reply to the state’s response filed in this court, Mided asserts there was a “sentencing discrepancy” because the trial court did not orally state that his sentence included community supervision, but the sentencing minute entry provides for such. Although he raised this claim in his initial petition for post-conviction relief, he did not raise it in his amended petition, and the trial court did not consider it. Nor does he raise that claim in his petition for review. We therefore do not address it further. *See State v. Lopez*, 217 Ariz. 433, n.4, 175 P.3d 682, 687 n.4 (App. 2008) (issues raised for first time in reply brief generally waived).

¶5 Mided asserts that the several attorneys appointed to represent him before he waived his right to counsel were ineffective in failing to obtain evidence relevant to his motion to suppress—specifically, in failing to obtain surveillance video from the gas station where police officers had searched his vehicle or interview the employees of the gas station “who operated the video surveillance system.” Typically, a defendant who waives his or her right to counsel cannot raise a claim of ineffective assistance of counsel. *See State v. Lee*, 142 Ariz. 210, 216-17, 689 P.2d 153, 159-60 (1984). Assuming, without deciding, that Mided’s subsequent waiver of his right to counsel does not bar him from raising a claim that his previously assigned attorneys were ineffective in representing him, we conclude the trial court did not err in summarily dismissing this claim.

¶6 “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). Although Mided argues the surveillance video “could have shown” that he had not consented to the search, he does not explain how this is possible, given that his consent was verbal and he does not assert the video recording included audio. And, although he claims he interviewed employees who informed him the recording had been destroyed two months after his arrest, he provides no evidence supporting this claim. Nor does he assert that any of his appointed attorneys were aware of the video recording, or had any reason to be aware of it, before its alleged destruction.

Accordingly, he has not demonstrated that trial counsel's conduct fell below prevailing professional norms or that he was prejudiced by counsel's conduct. *See id.*

¶7 Mided additionally argues his appellate counsel was ineffective in failing to argue on appeal that his waiver of his right to counsel was involuntary because he was forced to choose between "poor counsel" and self-representation. Our supreme court has recognized that, when a trial court denies an appropriate request for new counsel, a defendant forced to choose between self-representation and representation by counsel with whom he or she has an irreconcilable conflict may be found to have involuntarily waived his or her right to counsel. *See Moody*, 192 Ariz. 505, ¶ 23, 968 P.2d at 582.

¶8 But, before waiving his right to counsel, Mided did not request current counsel be replaced or argue that he had an irreconcilable conflict with that counsel.<sup>2</sup> And he has identified nothing in the record indicating counsel was unprepared to proceed. *See Pazden v. Maurer*, 424 F.3d 303, 316-17 (3d Cir. 2005) (waiver of counsel involuntary when assigned counsel unprepared for trial and court denied motion to continue). Moreover, as we noted above, he has not demonstrated that counsel's performance to that point had been deficient. Thus, he has not demonstrated he was forced to choose between self-representation and deficient counsel. And he has cited no authority, and we find none, suggesting his decision to waive his right to counsel was involuntary in these circumstances. Accordingly, because Mided has identified no clear legal basis to argue on appeal that his waiver of counsel was involuntary, he has not made

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<sup>2</sup>Mided previously had moved for replacement counsel on three occasions; in each instance, the trial court granted his motion and assigned new counsel.

a colorable claim of ineffective assistance of appellate counsel. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68; *see also State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995) (“Appellate counsel is not ineffective for selecting some issues and rejecting others.”).

¶9 For the reasons stated, although we grant review, relief is denied.

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge